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C O N F I D E N T I A L SECTION 01 OF 02 KABUL 000414

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E.O. 12958: DECL: 02/25/2019

TAGS: PGOV AF

SUBJECT: CHIEF JUSTICE AZIMI: TRANSITIONAL AUTHORITY IS A POLITICAL, NOT LEGAL, ISSUE

REF: 2/25 HOLBROOKE-DELL PHONE CALL

Classified By: CDA Christopher Dell, for reasons 1.4 (b) and (d).

¶1. (C) SUMMARY. Supreme Court Chief Justice Azimi told the Charge on 2/25 that the election date and presidential continuity issues were political and not legal disputes. Constitutionally, the election had to be held before 5/22, but Afghan political leaders have ignored the Constitution numerous times to follow a course of action based on a political consensus. Under Afghan law, the Supreme Court does not judge the constitutionality of any issue unless it is formally referred by either the leadership of the executive or legislative branch. Karzai would have no interest in referring the question of post-5/22 executive authority to the Court. The Parliament is on record as refusing to acknowledge the right of the Court to interpret the Constitution at all. It is unlikely therefore that the Court will be called to judge on this issue.

Constitution Requires pre-5/22 Election, but Crisis is Political, not Legal

¶2. (C) Azimi said the Constitution is clear: the election must be held before 5/22. There is no other interpretation. He detailed, however, numerous instances where political leaders had achieved a consensus contradictory to the law. For example, the Constitution contemplates district councils and mandates that one-third of the National Assembly's Upper House be elected representatives of district councils. Because district councils do not exist, President Karzai instead appointed those senators who should have come from district councils.

¶3. (C) Azimi acknowledged that ensuring Afghanistan's stability and security requires political leaders to resolve the election date and presidential continuity issues. He believed no one involved in the dispute was thinking about the good of the country. He characterized extending Karzai's term to 8/20 as a "small thing," compared to other past examples of politicians reaching a decision by political consensus that may have been inconsistent with the letter of the law. However, he also showed no enthusiasm for going on record with that view.

Equivocal on Election date

¶4. (C) Azimi viewed a pre-5/22 election date as the cleaner and constitutional option. He warned that fighting could be more intense in August than during the spring. Also, he expressed concern the Afghan public could stage violent demonstrations if Karzai stayed in office past 5/22. Azimi did not, however, say he inherently opposed a potential political consensus preserving the 8/20 election date. He did not wish to make any public statement to that effect, nor could the Court issue an advisory opinion.

15. (SBU) Charge outlined the U.S. position: the Afghan political establishment must preserve the 8/20 presidential election date and that while Karzai's mandate ends on 5/22, we believe he and the bulk of his government should assume caretaker status until August elections. In the U.S. view, it was imperative to maintain a strong central government during the peak Taliban fighting season over the summer months. The United States recognized Karzai's executive authority expired on 5/22. The most logical option would be for Karzai to step down on 5/22, and then assume a position as caretaker president until the inauguration. During that period, he could exercise some diminished level of authority, the exact limitations of which the Palace and opposition groups would have to decide. This diminished authority would address the suspicions of the opposition that Karzai would use the power of incumbency to influence the outcome of the election. The international community could serve as an oversight body over Karzai's actions in this capacity.

Ways Forward: State of Emergency More Likely than Loya Jirga

16. (C) Under one scenario outlined by Azimi, shortly before 5/22 Karzai could ask the Independent Election Commission (IEC) whether it was possible to hold a fair, free, and secure election. When the IEC said it would be impossible, Karzai could declare a state of emergency, which would constitutionally allow for an 8/20 election and presidential continuity. (The Justice Ministry also views this as the best "legal" option).

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Responding to the Charge's inquiry about the prospects of a Loya Jirga, Azimi said the President was much more likely to call a state of emergency and hold an August election. He also pointed out the Constitution required representatives from the non-existent district councils to serve as Loya Jirga representatives.

Role of the Supreme Court

17. (C) Responding to the Charge's inquiry, Azimi said he would not speak publicly in regard to constitutionality of the election date or his views on the presidential continuity issue. The Supreme Court's duty was to respond to inquiries channeled properly through the Government, not to speak to the media. Clarifying a previous ambiguity in Article 121 of the Constitution, Azimi declared that an official request via Parliamentary channels (not from an individual MP) for a Court interpretation could be construed as coming from the "government." At the moment, however, Parliament refuses to acknowledge the right of the Supreme Court to interpret the Constitution at all. For his part, it would not be in Karzai's self-interest to ask the Court to interpret the question of post-5/22 executive authority. It is unlikely therefore that the Court will be called to judge on this issue or play a constructive role in devising a solution.

DELL